No. 86-1447

In The Supreme Court of the United States

October Term, 1986

RAYMOND R. TORRES, PETITIONER

v.

SECRETARY OF THE NAVY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX OF AUTHORITIES

TABLE OF CONTENTS

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Raymond R. Torres, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 24, 1986. The Respondent's brief in opposition[1] misstates the record in a number of places, and contains errors which require clarification. The Petitioner shall deal, within the 10 pages allowed, as summarily as possible, with such matters which seem in most need of clarification. (Supreme Court Rule 22.5)

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[1] Hereinafter Resp. Opp. B. and page number

I. Reliance by Respondent upon the findings of the District Court in support of Defendant's proposition of a finding of no discrimination, reprisal, and retaliation is precisely the reason for the Petitioner's appeal, and the instant petition.

TheSolicitor General's conclusions in his Respondent's Opposition Brief based upon the findings of the District Court, and the Appeal's Court (Pet. App. A1-A43) states "no probative evidence has been presented to establish that the challenged personnel actions were motivated by a desire to discriminate or retaliate. . . . At no point did the district court suggest that it was deviating from the universally-understood standard of preponderance of the evidence." (Resp. Opp. B. 4). No amount of articulation of management reasons can obscure the fact that a series of severe, and adverse personnel actions were taken against the Petitioner (Pet. 1-3), partially based upon the filing of discrimination complaints, while in the full knowledge that Petitioner "had received the last of three consecutive Outstanding Performance Ratings in July 1976."[2] Respondent admits that "Marine Corps officials were alerted by Navy officials of petitioner's professional deficiencies." (Resp. Opp. B. 2). Rutherford v. American Bank of Commerce, 565 F.2d 1162 (1977). The fact that Petitioner was not charged specifically and in detail, on a timely basis (in

[2]Brief for Appellant to the Ninth Circuit Court of Appeals at 10, hereinafter App. B.

1977) under FPM Part 430 (Performance) or FPM Part 752 (Adverse Action) procedures on his alleged "deficiencies" does not detract from his right to "due process" in this matter despite the fact of his having followed discrimination complaint procedures.

> "We hold that the statutory employment rights of Fitzgerald are within the liberty and property concept of the Fifth Amendment and sufficient for him, as a preference eligible employee, to invoke the due process clause." Fitzgerald v. Hampton, 467 F.2d 755 (1977). (Pet. 3).

Petitioner's claims for "due process" as contained in his eleven 29 CFR 1613.262(b) reprisal charges were used against him by the Navy in inserting some of his charges of "restraint and interference" in the removal letter issued him in 1979. "If retaliation played a part in the adverse action, even though not the sole reason, the employer's action is a violation of 42 U.S.C. 2000e-3." Brown v. Rollins, U.S.D.C., W.D. North Carolina (1974).

Respondent argues that Petitioner had not presented "sufficient evidence to prove that his attempted removal was motivated by discrimination or reprisal." (Resp. Opp. B. 3). Evidence showing that the discriminatory act occurred because of opposition or participation may be direct or circumstantial. Outright admissions of Sec. 704(a) violations are rare.[3] The

[3] Employment Discrimination Law, B. Schlei, P. Grossman, at 438, copywrite 1976.

District Court not only did not find "sufficient evidence" to prove motivated reprisal action against Petitioner, in the Navy's "unsuccessful attempt to discharge petitioner" (Resp. Opp. B. 3), the Court found Petitioner guilty de facto, of the removal charges as contained in the letter of removal (Pet. A19-A21) while stating "The Court makes no finding as to whether this attempted removal by the Navy was a substantially correct action to take. Nor does the Court make any finding as to whether the MSPB was correct in overturning that removal. Neither of those issues is properly before this Court." (Pet. A20). In short, Petitioner is not credited in any positive manner for the reversal of all charges/specifications by the MSPB yet probative weight is given by the Court to the discharge incident. For example, the Court states "It is conceded that if those allegations were true, that the kind of conduct described would be the kind of conduct that would merit removal." (Pet. A21). Petitioner's discharge in January 1980 was accompanied by his request for a TRO/Injunction which was denied (Pet. A12-13; App. B26-30; also, Appellee's Brief to the Ninth Circuit Court of Appeals at 38-40). In its decision the District Court was moot on the matter of the TRO/Injunction as was the Appellate Court (Pet. A27-A42). Subsequent to the District Court's decision the Ninth Circuit Court of Appeals rendered its decision in Garcia v. Lawn, 86 Daily Journal D.A.R. 4099, Dec. 31, 1986, _____F.2d_____, (Pet. A12-13). At B4100, id., the Court states as follows:

"This case, however, involves more than a claim of harm to the plaintiff and his family as the result of the termination. The claimed violation of the law in this case is retaliatory action for the exercise of Title VII rights, action which, if plaintiff is correct, will have a deleterious effect on the exercise of these rights by others."

Since the Courts below were moot on the matter of the TRO/Injunction, they did not consider the effects of possible retaliatory conduct upon the exercise of Title VII rights by other government employees nor did it consider whether or not Petitioner was "made whole" when he was reinstated. As stated, in Garcia, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief. In this case there can be." (Id.).

II. Respondent's Opposition Brief misstates Petitioner's position regarding Affirmative Action and preferential treatment under the precedent established in Johnson v. Transportation Agency, No. 85-1129 (Mar. 25, 1987).

At trial Petitioner relied upon University of California v. Bakke 438 U.S. 265, in his understanding of Affirmative Action, together with the fact that he was in the "best qualified" group of six applicants for the Rota position (Pet. i, and 13-21). That he was not selected from the best qualified group certainly did nothing for the

Navy's statistics in the GS-13 grade range nor is it clear that the Navy was free to admittedly ignore its own Affirmative Action Plan (AAP) requirements (Pet. 17 and A9.)[4] In Johnson, supra, Respondent mistakenly suggests that the Navy's decision to bypass Petitioner's selection (ignoring its own AAP) was non-violative of Title VII (Resp. Opp. B. 5), rather than understanding that Petitioner was asking for AAP consideration together with his qualifications (best qualified). Instead Petitioner faced sustained reprisal and retaliation.

III. Respondent's failure to provide for administrative and statutory "due process" is a thread that runs through Petitioner's complaints.

The District Court misstated the facts with respect to position classification responsibility at Naval Air Station, Miramar (Pet. A10-A12). It is a well known principle of personnel management that position classification is a line management function rather than a staff personnel function. Petitioner arrived at NAS Miramar in September 1973 (Pet. A-11). External review of the classification process did not commence at Miramar under Petitioner until 1976, yet the Court states he did little to correct position classification problems

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[4] "Captain Richard Damico did not consider affirmative action policies of the Navy in making his selection of Mr. Wardlow; but rather made his selection based entirely on merit considerations."

experienced at Miramar since 1973 (Pet. A11-A12). Had timely statutory/regulatory "due process" been followed (e.g., FPM Part 430 -- Performance procedures -- or Part 752 -- Adverse Action procedures) rather than retaliation, this misapprehension could have been avoided (Pet. 4 and 22-23).

IV. Respondent's Opposition Brief partially misapprehends Petitioner's argument with reference to costs.

Petitioner does not argue with the application of Rule 54(d), Fed.R.Civ.P., in the awarding of costs (Resp.Opp.B. 3). Rather, petitioner referenced the Christiansburg standard which stated in part that the plaintiff's "relied on a 1978 Department of Justice memorandum that direct government attorneys seek costs only where the suit meets the Christiansburg standard." Lewis v. NLRB, 750 F.2d 266 (U.S.C.A. 5, 1985) at 1279 (Brief for Appellant, 9th C.A. at 41). Also, several of Respondent's witnesses were taken out of order during Petitioner's presentation of the case in chief, and this testimony was utilized by the Court to grant summary dismissal under Rule 41(b). Respondent's affirmative reply to the case in chief was not necessary and was not made (Resp.Opp.B. 4). Costs, therefore, should be reduced in the amount charged for Respondent's witnesses presented out of order.

V. The Courts below raise the threshold of the preponderance of the evidence standard beyond the point

whereby Petitioner may establish a prima facie case of retaliation.

The District Court stated:

> "plaintiff has failed to demonstrate that the actions taken adverse to his interests can be causally linked to his filing of prior EEO complaints. More must be shown than the mere fact that an adverse personnel action occurred subsequent in time to plaintiff's filing of an EEO complaint." (Pet. A31).

The Appellate Court stated, in reference to Petitioner's retaliation claims, as follows:

> "However, the trial court found no evidence of racial motivation for any actions taken by the Navy and no "causal link" between those actions and Torres' discrimination complaints." (Pet. A41).

By this reasoning, in reviewing the lower court's conclusions of fact and law, the Appellate Court indicates a requirement for a "causal link" between "racial motivation" and Petitioner's discrimination complaints. Employment Discrimination Law, supra, at 438 specifically addresses the "Causal Connection" in making the following points: 1) Evidence may be direct or circumstantial; 2) Outright admissions of Sec. 704(a) violations are rare; 3) Frequently there will be little or no direct evidence available of retaliatory motive, and substantial reliance necessarily will have to be placed on circumstantial evidence.

Sec. 704(a) is not confined to statutory minorities, it extends protection to all who assist or participate in any manner in Title VII proceedings regardless of their race or sex. Eichman v. Indiana State University Board of Trustees, (1979, CA7 Ind), 597 F.2d 1104 (male assisted female in Title VII sex discrimination claim).

VI. Conclusion

In conclusion, Petitioner urges that based upon the totality of the adverse personnel actions, and all the relevant facts, there should be a presumption of intent to discriminate and to retaliate. The decisions below are not consistent with the intent of Title VII which is to eliminate the effects of employment discrimination. The granting of this Petition will not unduly infringe upon the rights and interests of other Navy employees. Johnson, supra.

R. R. TORRES, In Propria Persona

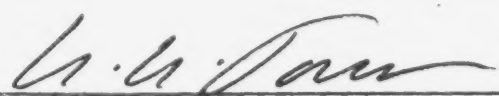
Dated: June 1, 1987

APPENDIX

CERTIFICATE OF FILING

I, RAYMOND R. TORRES, Petitioner hereby certify that on June 3, 1987, the PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION, was deposited with the United States Post Office, and the mailing of said REPLY BRIEF took place within the time permitted by the rules of the Supreme Court of the United States. A copy of said REPLY BRIEF was served upon the Solicitor General, Department of Justice, Washington, D.C., 20530.

Executed this 3d day of June 1987, at 10910 Glencreek Circle, San Diego, CA 92131-2526.



RAYMOND R. TORRES, Petitioner